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**IN THE  
COURT OF APPEALS OF INDIANA**

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JEFFREY D. PEREZ,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 45A03-0704-CR-165

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APPEAL FROM THE LAKE SUPERIOR COURT  
CRIMINAL DIVISION  
The Honorable Salvador Vasquez, Judge  
Cause No. 45G01-0608-MR-8

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**December 12, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellant-Defendant, Jeffrey D. Perez (Perez), appeals his sentence for murder while committing a robbery, Ind. Code § 35-42-1-1(2).

We affirm.

## ISSUE

Perez raises one issue on appeal, which we restate as: Whether Perez was properly sentenced based upon aggravating circumstances and in light of the nature of the offense and his character.

## FACTS AND PROCEDURAL HISTORY

On July 4, 2006, Perez and his friend, Luriana Yzaguirre (Yzaguirre), visited Perez's godfather, Ruben Rodriguez (Rodriguez), where the three shared drinks. During the course of the day, Perez removed a set of house keys from Rodriguez's table. Later that day, Perez and Yzaguirre left Perez's home to purchase more alcohol. Instead of purchasing the alcohol, the two left and met with another friend, Andrew Anguiano (Anguiano).

During this time, the three men devised a plan to kill Rodriguez. Perez, Yzaguirre, and Anguiano returned to Rodriguez's home where Perez dropped off Yzaguirre and Anguiano. Perez drove to a nearby lake where he told Yzaguirre and Anguiano he would be waiting. Anguiano and Yzaguirre entered Rodriguez's home, went into Rodriguez's bedroom and strangled him. Shortly thereafter, Anguiano instructed Yzaguirre to look around for things to steal. Yzaguirre entered Rodriguez's room and took some necklaces. Anguiano and Yzaguirre wrapped Rodriguez's body in a sheet and secured the sheet with

duct tape. The men then placed Rodriguez's body in the trunk of Rodriguez's yellow Cadillac, only to drive away in Rodriguez's red Cadillac. Thereafter, Anguiano and Yzaguirre met Perez at the lake. Later that night, the trio returned to Rodriguez's home, removed more of his property, and took his body, still in the yellow Cadillac, to a wooded area where they buried it in a shallow grave with a shovel provided by Perez.

On August 4, 2006, the State filed an Information, charging Perez with Count I, murder, a felony, I.C. § 35-42-1-1, and Count II, murder while committing a robbery, a felony, I.C. § 35-42-1-1. On February 1, 2007, a jury trial was held and the jury found Perez not guilty of murder, but guilty of murder while committing a robbery.

On March 2, 2007, at a sentencing hearing, the trial court found that Perez had violated a position of trust in committing the crime and considered it to be an aggravating circumstance. The trial court also concluded that Perez's history of five misdemeanor convictions and additional multiple contacts with law enforcement were aggravating factors. Finally, the court found that prior leniency by the trial courts had not successfully deterred Perez from criminal conduct and concluded that this was also an aggravating factor. The only mitigating circumstance found by the trial court was that imprisonment would result in undue hardship to Perez's dependents. The trial court determined that each of the aggravators standing alone outweighed the sole mitigating circumstance. The trial court sentenced Perez to a term of sixty years for murder while committing a robbery. On March 8, 2007, the trial court reduced Perez's sentence to a term of fifty-five years in the "interest of justice". (Appellant's App. p. 74).

Perez now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Aggravating Factors*

Perez first argues that the trial court abused its discretion by finding as aggravating factors: (1) Perez's history of criminal activity, much of which did not result in convictions of any offense and (2) that Perez was in a position of trust with Rodriguez.

#### *A. Standard of Review*

Our supreme court recently clarified a defendant's right to appellate review of a trial court's sentencing decision by stating, "[s]o long as the sentence is within the statutory range, it is subject to review only for abuse of discretion." *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *reh'g granted on other grounds*. An abuse of discretion occurs if we find the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Payne v. State*, 854 N.E.2d 7, 13 (Ind. Ct. App. 2006). Further, a trial court may impose any sentence within the statutory range without regard to the existence of aggravating or mitigating circumstances. *Anglemyer*, 868 N.E.2d at 489. However, to perform our function of reviewing the trial court's sentencing discretion, "we must be told of [its] reasons for imposing the sentence. . . . This necessarily requires a statement of facts, in some detail, which are peculiar to the particular defendant and the crime, as opposed to general impressions or conclusions." *Id.* at 490 (quoting *Page v. State*, 424 N.E.2d 1021, 1023 (Ind. 1981)). Such facts must have support in the record. *Anglemyer*, 868 N.E.2d at 490.

### B. Criminal History

Perez argues that the trial court abused its discretion by finding as an aggravating factor his prior criminal history. According to I.C. § 35-38-1-7.1(a)(2), “[i]n determining what sentence to impose for a crime, the court may consider the following aggravating circumstance: the person has a history of criminal or delinquent behavior.” On March 2, 2007, the trial court indicated in Perez’s sentencing order that he had a history of criminal convictions, which included fourteen contacts with law enforcement resulting in five misdemeanor convictions. The trial court found Perez’s criminal activity to be an aggravating circumstance. While not all of Perez’s arrests for alleged incidents resulted in a conviction, charges that do not result in convictions may be considered by the sentencing court in context, but something more than mere recitation unaccompanied by specific allegations should be shown. *See McElroy v. State*, 865 N.E.2d 584, 591 (Ind. 2007). Our review of the record reveals that the trial court combined Perez’s charges that did not result in convictions with his charges resulting in convictions as an aggravating factor. However, the trial court did not cite any specific allegations or probative evidence of specific criminal conduct as required. *See id.* Thus, we conclude the trial court improperly considered portions of Perez’s history of criminal activity as an aggravating factor.

Nevertheless, five misdemeanor convictions remain for the trial court to consider as an aggravating factor. However, whether and to what extent a sentence should be enhanced based upon an individual’s criminal history hinges on the weight of that history. *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006). “This weight is measured by the number of prior

convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Id.* The trial court considered Perez's five misdemeanor convictions between June 1993 and March 2002. Not only are the misdemeanors unrelated to the present offense, but the most recent offense was four years prior to this offense. While the convictions included trespass, battery, criminal mischief, conversion, and intimidation, these are all misdemeanor offenses. Thus, based on the gravity, proximity, and lack of similarity to the instant offense, the trial court improperly concluded that Perez's criminal history was a significant aggravator.

### *C. Position of Trust*

Next, Perez argues that the trial court abused its discretion when it determined that Perez abused the position of trust he held with Rodriguez. The trial court abused its discretion when it found Perez's abuse of trust to be an aggravating circumstance.

Abusing a position of trust is a valid aggravator. *Monroe v. State*, 868 N.E.2d 1219 (Ind. Ct. App. 2007). The evidence is undisputed that the victim was Perez's godfather and former uncle by marriage. On the day of the murder, Perez was inside the victim's home having drinks. During this time, Perez stole the keys from Rodriguez to use later in the perpetration of the murder. This relationship was not substantiated beyond a casual, social relationship. The trial court may consider as an aggravating circumstance the defendant's being "in a position having care, custody, or control of the victim of the offense." I.C. §35-38-1-7-1(a)(8). *See Smith v. State*, 873 N.E.2d 1141 (Ind. Ct. App. 2007). However, there is

no evidence to suggest that the relationship could be characterized as a “special” relationship where a position of trust existed. Thus, the trial court abused its discretion because a position of trust did not exist between Perez and Rodriguez. Although we do find two of the three aggravators to be invalid, one valid aggravator, *i.e.*, ineffective prior leniency, remains.

## II. *Indiana Appellate Rule 7(B)*

Perez also argues that the sentence imposed was inappropriate when considering his character and the nature of the offense. We disagree.

Where the trial court has entered a reasonably detailed sentencing statement explaining its reasons for a given sentence that is supported by the record, we may only review the sentence pursuant to Appellate Rule 7(B). *Anglemyer*, 868 N.E.2d at 492. This rule provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we] find that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. App. R. 7(B).

Our evaluation of the nature of the crime in this case leads us to conclude that Perez committed acts that were instrumental in the murder of his godfather. Specifically, Perez stole Rodriguez’s keys to gain access to the home later. The trial court stated Perez was the facilitator, based on the evidence, that allowed the crime to occur. The aggregate of Perez’s actions ultimately resulted in the death of Rodriguez. Furthermore, the advisory sentence imposed is appropriate because “[r]egarding the nature of the offense, the . . . advisory sentence . . . is the starting point the Legislature has selected as an appropriate sentence from the crime committed.” *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). The advisory

sentence for murder is fifty-five years of imprisonment. *See* I.C. § 35-50-2-3. Thus, we conclude Perez's sentence comports with the nature of the offense.

Additionally, Perez's character does not warrant a reduced sentence. Not only was Perez instrumental in the murder of his godfather, but he has a criminal history comprised of five misdemeanors which, while it is not enough to constitute a significant aggravator, it speaks to his character and continued lack of respect for the laws of our society. We find Perez's criminal history persuasive. In addition, despite his relationship with his godfather, Perez was capable of facilitating and planning not only his godfather's murder, but the subsequent pilfering of his godfather's possessions. Because the trial court stated that each aggravator on its own outweighs the mitigator, the remaining valid aggravator still outweighs the mitigator. As a result, we find the trial court's sentence of the advisory fifty-five years is appropriate in light of Perez's character.

#### CONCLUSION

Based on the foregoing, we conclude that the trial court properly sentenced Perez.

Affirmed.

FRIEDLANDER, J., concurs.

SHARPNACK, J., concurs in result.